

1/17/75

Petitioner is a widely diversified corporation operating on a national and international basis. It operates through divisions and wholly owned subsidiaries that provide many products and services for consumers.

Petitioner's activities are generally broken down into three general categories; "Consumer Products", "Industrial, Institutional and Commercial Products", and "Airmotive Engine Services". The consumer products line includes household cleaning products, drugs and toiletries, swimming pool chemicals and equipment, mobile homes, agricultural products, vegetable, flower and farm seeds, and specialty food products.

On or about January 20, 1970, the Board of Equalization was advised by letter (Exhibit A) that [redacted] a California corporation and wholly owned subsidiary of [redacted] located in El Centro, California, holding seller's permit No. [redacted] had been liquidated into the parent effective October 31, 1969. The Board was advised that [redacted] had been reporting on an annual basis and that it filed its final California sales and use tax return for the calendar year ending December 31, 1969.

The Board was also advised that the operations of [redacted] were to be included in the sales and use tax return of [redacted] for the quarter ending March 31, 1970, and was requested to cancel the [redacted] seller's permit and issue a new sub-location permit number for the El Centro address under master account

[redacted] was, at the time under consideration, a wholly owned subsidiary of [redacted] Co. It operated as a producer, packer and shipper of fresh vegetables in California and Arizona.

On or about June 30, 1971, [redacted] transferred its [redacted] assets, which had been set up as [redacted], to [redacted]. In consideration for the transfer, [redacted] was debited and [redacted] credited in the account between [redacted] and [redacted] a sum equal to the aggregate of the net book value as of June 30, 1971 of supplies, inventory, accumulated crop costs, construction in progress, and the net value of land and land improvements, buildings and improvements and machinery, and improvements transferred.

This controversy arises as a result of the transfer of [redacted] (formerly [redacted]) to [redacted] which was deemed to include a sale of fixed assets (machinery, equipment, furniture and fixtures) measured at \$370,648.

Petitioner's representatives contend that the sale of the [redacted] assets was an occasional sale by [redacted] because the [redacted] assets were held and used in an activity for which no seller's permit was required.

In addition, it is contended that [redacted] should not be deemed a retailer of capital assets or equipment, and the sale is exempt under Regulation 1595 (18 Cal. Admin. Code 1595). Regulation 1595 provides, in part, as follows:

Tax does not apply to a sale of property not held or used in the course of...(activities for which a seller's permit would be required) unless the sale is one of a series of sales sufficient in number, scope and character to constitute an activity for which a seller is required to hold a seller's permit or would be required to hold a seller's permit if the activity were conducted in this state.

Generally, a person who makes three or more sales for substantial amounts in a period of 12 months is required to hold a seller's permit. A person who makes a substantial number of sales for relatively small amounts is also required to hold a seller's permit.

Following is a schedule of

— Sales of assets by month

<u>Month-Year</u>	<u>Description</u>	<u>Amount</u>
May - 1970	Equipment (for resale)	\$ 1,000
June - 1970	Equipment	2,550 <u>2/</u>
July - 1970	Equipment	75,000 <u>3/</u>
July - 1970	Rotary Trimmer (2 sales)	1,250 <u>1/</u>
October - 1970	Equipment	3,898 <u>1/</u>
February - 1971	Equipment	1,234 <u>2/</u>
March - 1971	Eastman Cutter	100 <u>1/</u>
April - 1971	Glass Lined Tank	300 <u>2/</u>
June 30, 1971	Machinery, Equipment, etc.	370,648 <u>1/</u>
July - 1971	Turbulator	13,500 <u>2/</u>
September - 1971	Plastic Thickness Gauge	1,500 <u>1/</u>
October - 1971	Equipment	1,300 <u>2/</u>
October - 1971	Equipment	1,312 <u>2/</u>
February - 1972	Equipment	1,500 <u>2/</u>
March - 1972	Bottle Trimmer	400 <u>2/</u>
April - 1972	Spectrophotometer	4,000 <u>1/</u>
June - 1972	Equipment	2,841 <u>2/</u>
June - 1972	Racks & Pressboard	1,500 <u>2/</u>
September - 1972	Equipment	1,200 <u>2/</u>
October - 1972	Forklift	400 <u>1/</u>
December - 1972	Equipment	255

1/ Not reported. Included as taxable in the audit.

2/ Tax accrued and reported.

3/ Out-of-state sales-included in work papers but not set up as taxable.

Conclusions

One of Petitioner's contentions is that [redacted] activities did not require a seller's permit. However, prima facie evidence is the fact that before [redacted] became a division [redacted] it held seller's permit No. [redacted] because of its activities. When the corporation was "liquidated into the parent" [redacted] the permit was cancelled. However, [redacted] advised the Board of Equalization that [redacted] operations for the first quarter of 1970 would be filed with the [redacted] quarterly return under account [redacted]

In addition, [redacted] requested the Board of Equalization to issue a sub-location permit for the [redacted] operations under [redacted] master account [redacted]. All this would indicate that the [redacted] operations would continue as before the liquidation into the parent and that they would still require holding a seller's permit.

The fact that [redacted] operated under [redacted] permit number does not mean that its activities did not require a seller's permit. Thus, it is concluded that the [redacted] assets were held and used in an activity for which a seller's permit was required, and this, alone, precludes finding that the transfer was an occasional sale under section 6006.5. 4/

Be that as it may, in the twelve-month period preceding the sale of the [redacted] assets, [redacted] made six sales, three of which were in California, and in the twelve-month period following the sale of the assets it made 8 sales, four of which were in California.

Thus, notwithstanding the fact that [redacted] out-of-state sales are to be counted 4/ for purposes of determining whether the number of sales were sufficient to make [redacted] a "seller" required to hold a seller's permit, [redacted] made sales in California sufficient in number (three or more) to be deemed a seller and required to hold a seller's permit.

Further, [redacted] did hold a seller's permit so the chances that the assets sold in the audit period were held in an activity for which a permit was required is very real.

Even by eliminating the [redacted] assets sale and disregarding the fact that [redacted] did hold a seller's permit, the sales of equipment activity was sufficient in number, scope and character to require a seller's permit, and the California sales were subject to tax and were properly included in the audited liability.

4/ Tax applies to all retail sales of tangible personal property held or used by the seller in the course of activities for which a seller's permit or permits is required or would be required if the activities were conducted in this state. (Regulation 1595)

The fact that the sale of the _____ assets was great in dollar amount by comparison to the other sales of assets would not, in and of itself, dictate the conclusion that it was an occasional sale.

The large sum of money was paid for machinery, equipment, furniture and fixtures. If that sum were allocated to the many separate items of assets sold, the amount paid for each item would likely be close to average amounts paid for each item of equipment sold at other times in the twelve months preceding and following the bulk sale of the division assets.

Thus, it cannot be said that the one sale that grossed \$370,648 was outside the scope of the other sales when applying the number, scope and character test under section 6006.5 of the Sales and Use Tax Law.

For example, if a person were to sell one horse, one mule and one jackass for \$500 each in three separate transactions in a twelve-month period, and within that same twelve-month period sell 100 horses, mules and jackasses for \$500 each in one bulk sale transaction that grossed \$50,000, the single bulk sale would not be an occasional sale simply because it was large in dollar amount by comparison to the other three sales. Further, it is clear that the character of the sales would be sufficiently similar to preclude the large sale from being occasional.

As to the "character" of the sales made by _____ the property sold was capital assets (tangible personal property) held and used by _____

Regulation 1595 provides that a person who makes three or more sales for substantial amounts in a period of 12 months is required to hold a seller's permit, and a person who makes a substantial number of sales for relatively small amounts is also required to hold a seller's permit. Thus, no matter how one might choose to view _____ asset sales activity in 1970, 1971 and 1972, it is clear that a seller's permit would have been required had _____ not already held one for sales made in its regular course of business as a seller.

The _____ matter is not unlike two other matters recently considered by the Board, (_____ and _____)

In _____, the taxpayer made 12 sales of equipment used in its supermarket stores during the immediate twelve months prior to a bulk sale of used supermarket store equipment that grossed over \$2,000,000. Also, the taxpayer made 15 sales of used equipment during the immediate twelve months following the bulk sale. The 12 sales ranged in gross receipts from \$192 to \$30,000 and the 15 sales from \$3 to \$16,000.

The Board found that in the twelve months preceding and/or following the bulk sale of equipment the taxpayer made over three sales of fixed

assets (equipment) which were similar in scope and character. Therefore, the Board concluded that the bulk sale of the fixed assets was one of a series of sales sufficient in themselves in number, scope and character to require the holding of a seller's permit. Accordingly, the bulk sale of the equipment was not an occasional sale.

In _____, the taxpayer held a seller's permit for purposes of selling and renting camera equipment. The company, from time to time sold used rental equipment at retail. The company purchased a very expensive video taping mobile camera equipment unit which it rented for taping athletic contests and other events for television shows. The video taping unit was departmentalized into a division of the corporation, and after some time it was sold for over \$700,000.

The taxpayer contended the sale of the video tape unit was an occasional sale. The Board concluded the sale was not occasional as it was one of a series in number, scope and character of other (camera equipment) sales.

In the Mark Armistead, Inc. matter the Los Angeles Superior Court in Mark Armistead, Inc. v. State Board of Equalization, (LASC No. 932 913, June 7, 1973), concluded that Mark Armistead, plaintiff, was at all material times a retailer within the meaning of the California Sales and Use Tax Law and the sale of the various items in issue, including the sale of the video tape equipment unit, was not an occasional sale within section 6006.5 of the Sales and Use Tax Law.

In sum, it is concluded that _____ sale of the _____ was not an occasional sale and was properly included in the audited measure of tax on sales of capital assets.

Recommendation

Redetermine without any adjustment to the protested item.

Robert H. Anderson

Robert H. Anderson, Hearing Officer

JAN 17 1975

Date

1/25/75